Supreme Court, U.S.
FILED

No. 00-542 SEP 15 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ABKCO MUSIC, INC.,

Petitioner,

v.

STEPHEN LAVERE, as an individual, dba King of Spades Music; DELTA HAZE, INC., in its corporate capacity, dba King of Spades Music; MIMOSA RECORD PRODUCTIONS, INC., in its corporate capacity, dba King of Spades Music,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD S. ZAKARIN
Counsel of Record
ILENE S. FARKAS
PRYOR CASHMAN SHERMAN & FLYNN LLP
Attorneys for Petitioner
410 Park Avenue
New York, New York 10022
(212) 421-4100

162177

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

TTPP

QUESTION PRESENTED

Under governing Supreme Court authority barring the retroactive application of statutes and statutory amendments to pending cases, can the 1997 amendment of § 303(b) of the Copyright Act, which abrogated the well-established law in the Ninth Circuit and elsewhere that the release of a musical composition on a phonorecord constitutes publication, be applied retroactively to pending cases despite the fact that the amendment explicitly provides that it does not take effect until enactment while other provisions of the same amendatory act expressly provide for retroactive application?

STATEMENT PURSUANT TO RULE 29.6

Petitioner ABKCO Music, Inc. ("ABKCO") is a wholly owned subsidiary of ABKCO Music & Records, Inc., which is privately held.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	7
The Ninth Circuit's Holding That The Recent Amendment To § 303 Of The Copyright Applies Retroactively To Pending Cases Raises Important Federal Questions	7
A. *La Cienega* Was Consistent With Pre-Existing Law and Therefore The Amendment Changed, Not Clarified, Existing Law	7

Contents

Page

B. New Laws, Absent Congressional Mandate To The Contrary, Are To Be Applied Prospectively 15

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

Biltmore Music Corp. v. Kittinger, 238 F.2d 373 (9th Cir.), *cert. denied*, 352 U.S. 954, 77 S. Ct. 327 (1956) 9

Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S. Ct. 468 (1988) 15

Butts v. City of New York Dep't of Housing, 990 F.2d 1397 (2nd Cir. 1993) 14

Cannon v. University of Chicago, 441 U.S. 677, 99 S. Ct. 1946 (1979) 18

Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 84 S. Ct. 779 (1964) 12

Fowler v. Unified School District No. 259, 128 F.3d 1431 (10th Cir. 1997) 13

Jeffries v. Wood, 114 F.3d 1484 (9th Cir.), *cert. denied*, 522 U.S. 1008, 118 S. Ct. 586 (1997) 18, 19

Jones v. Virgin Records, Ltd., 643 F. Supp. 1153 (S.D.N.Y. 1986) 11

La Cienega Music Co. v. ZZ Top, 53 F.3d 950 (9th Cir.), *cert. denied*, 516 U.S. 927, 116 S. Ct. 331 (1995) 3, 4, 5, 6, 7, 9, 10, 17

Cited Authorities

Page

Landgraf v. U.S.I. Film Products, 511 U.S. 244, 114 S. Ct. 1483 (1994) 5, 6, 15, 16, 17, 18

Leeds Music Corp. v. Gusto Records, Inc., 601 F.2d 589, 1979 U.S. App. Lexis 13834 (6th Cir. 1979) 10

Lindh v. Murphy, 521 U.S. 320, 117 S. Ct. 2059 (1997) 15

Marbley v. Bane, 57 F.3d 224 (2nd Cir. 1995) 13, 14

Marbury v. Madison, 5 U.S. 137, 178, 2 L. Ed. 2d 60 (1803) 14

Mayhew v. Allsup, 166 F.3d 821 (6th Cir. 1999) ... 19

McIntyre v. Double-A Music Corp., 166 F. Supp. 681 (S.D. Cal. 1958) 9

Mills Music, Inc. v. Cromwell Music, Inc., 126 F. Supp. 54 (S.D.N.Y. 1954) 9

Murray v. Gibson, 56 U.S. 421 (1853) 15

O'Gilvie v. United States, 519 U.S. 79, 117 S. Ct. 452 (1996) 13

RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712, 612 S. Ct. 393 (1940) 11

Cited Authorities

	Page
Ribando v. United Airlines, Inc., 787 F. Supp. 827 (N.D. Ill. 1992)	14
Rosette v. Rainbo Mfg. Corp., 546 F.2d 461 (2nd Cir. 1976)	*passim*
Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 84 S. Ct. 784 (1964)	12
Shapiro, Bernstein & Co. v. Miracle Record Co., 91 F. Supp. 473 (N.D. Ill. 1950)	9
Shwab v. Doyle, 258 U.S. 529, 42 S. Ct. 391 (1922)	15
United States v. Heth, 7 U.S. 399, 3 Cranch 399, 408 (1806)	15
United States v. Price, 361 U.S. 304, 80 S. Ct. 326 (1960)	13
Weinberger v. Rossi, 456 U.S. 25, 102 S. Ct. 1510 (1982)	13

Statutes:

17 U.S.C. § 303	1, 5, 7
17 U.S.C. § 303(b)	*passim*
28 U.S.C. § 1254(1)	1

Cited Authorities

	Page
28 U.S.C. § 1331	2
28 U.S.C. § 1338	2
28 U.S.C. § 2201	2
Other Authorities:	
1 *Goldstein, Copyright* (1989) § 3.2.2	9
1 Nimmer on Copyright (1992) § 4.05[B]	4, 9

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed June 26, 2000 ..... 1a

Appendix B — Order And Judgment Of The United States District Court For The Central District Of California, Western Division Dated May 18, 1998 And Filed May 20, 1998 ..... 21a

Appendix C — Relevant Statute 23a

Appendix D — Technical Amendments To Title 17, United States Code, As Enacted By The Senate And House Of Representatives On November 13, 1997 ..... 24a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is reported at 217 F.3d 684 (9th Cir. 2000). The district court opinion is unreported and annexed hereto at Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was dated and filed on June 26, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cases involves the 1997 amendment to § 303(b) of the Copyright Act, 17 U.S.C. § 303(b), annexed hereto at Appendix C, which added the following language to § 303 of the 1976 Copyright Act:

> (b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.

STATEMENT OF THE CASE

Petitioner ABKCO Music, Inc. ("ABKCO") commenced this action in the district court of the Central District of California, seeking a declaratory judgment that two compositions allegedly written and recorded by Robert Johnson ("Johnson") in the 1930's had fallen into the public domain by no later than 1967 since any alleged copyrights therein were not renewed, as required under the 1909 Copyright Act, 28 years after the songs were first published by the distribution of phonorecords embodying the compositions. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338 and 2201.

The sole issue involved in this Petition is whether the 1997 amendment to § 303(b) of the Copyright Act may be applied to this case, which had been pending for over two years at the time of its enactment. Resolution of this issue centers on whether this amendment clarified or changed existing precedent. As will be demonstrated herein, prior to this amendment, and at the time that ABKCO's versions of the two compositions, "Love In Vain" ("LIV") and "Stop Breakin Down" ("SBD") were created in 1969 and 1972, consistently applied case law under the 1909 Copyright Act provided that the distribution of phonorecords constituted "publication" of the musical compositions embodied thereon. Publication was not a defined term under the 1909 Copyright Act (although it demarked the passage from common law copyright to statutory copyright). Under the 1976 Copyright Act, publication ceased to have any statutory copyright significance.

With the singular exception of the 1976 Second Circuit decision in *Rosette v. Rainbo Mfg. Corp.*, 546 F.2d 461

(2nd Cir. 1976), a decision criticized by both legal commentators and the courts that had occasion to subsequently address the issue, the applicable law was exactly the same at the time that ABKCO brought this action.[1] In *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950 (9th Cir.), *cert. denied*, 516 U.S. 927, 116 S. Ct. 331 (1995), the Ninth Circuit definitively followed the majority rule which stated that the public distribution of phonorecords constitutes "publication" under the 1909 Act. *La Cienega*, 53 F.3d at 952.

In *La Cienega*, the Ninth Circuit adopted the majority rule and held that the sale of phonorecords constituted "publication" under the Copyright Act of 1909. 53 F.3d at 953. In so holding, the Ninth Circuit found that:

> The courts in applying the 1909 Act, were in most instances unpersuaded by the argument that no publication occurs by virtue of the sale of a phonorecord because the record is not a "copy" of the work recorded. On the contrary, the relatively few courts which considered the question were almost unanimous in determining that public sale or other distribution of phonorecords does constitute a publication and

---

1. As will be shown below, the *Rosette* decision actually reversed existing Second Circuit precedent under the mistaken belief that the newly enacted 1976 Copyright Act would moot the issue. However, *Rosette* also provided for a contracted common law right that would have ended any protection for the Johnson versions of LIV and SBD at the same time that the statutory copyrights would have expired. Thus, even under *Rosette*, Johnson's versions of LIV and SBD would have entered the public domain by 1967.

> hence a divestment of common law rights in the works recorded. The conclusion is certainly consistent with the common understanding of the term "copy." Moreover, it is in accord with the underlying rationale of the publication doctrine. That is, an author in permitting records of his work to be publicly marketed is certainly engaging in a form of exploitation of his work and should therefore be required to seek protection, if at all, only under the limited monopoly concept of the federal Copyright Act.

53 F.3d at 953 (citing 1 Nimmer on Copyright (1992) § 4.05[B] at 4-26 (citations omitted)).

However, on November 13, 1997, after both parties had filed their respective motions for summary judgment, President Clinton signed a series of amendments to the Copyright Act into law (the "1997 Act"), including the amendment to § 303(b). (App. D at 24a). Section 11 of the 1997 Act specifically provided that the distribution of a phonorecord before January 1, 1978 "shall not for any purpose constitute a publication of the musical work embodied therein."[2] (App. D at 39a). Section 13 of the Act

---

2. The amendment of § 303(b) only had pertinence to phonorecords distributed prior to January 1, 1978 because after January 1, 1978, the effective date of the 1976 Copyright Act, publication no longer determined copyright status under the 1976 Copyright Act. In effect, in purporting to amend the 1976 Copyright Act, Congress was really directing how the courts should decide cases under the 1909 Copyright Act, an action implicat ing separation of powers questions. This issue was addressed in oral argument before the Ninth Circuit but not addressed in the decision.

provided that "except as provided in subsection (b) and (c), the amendments made by this Act shall take effect on the date of the enactment of this Act."[3] (App. D at 46a).

Accordingly, the sole issue presented to the Ninth Circuit was whether the 1997 amendment to § 303(b) applied retroactively to pending cases, including the instant case. In opposition to ABKCO's motion for summary judgment, Respondent LaVere argued that, because the amendment of § 303(b) merely clarified existing law and this action only involved prospective relief, there is no presumption against retroactivity and therefore the amendment applies to this case. In response, ABKCO contended that the amendment completely reversed existing law and application of the amendment would have the retroactive effect proscribed by governing Supreme Court precedent (*Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994)). Thus, ABKCO contended, *La Cienega* continued to govern this case.

The district court agreed with ABKCO, concluded that *La Cienega* governed this case, the 1997 amendment to § 303 was not applicable to this case and granted summary judgment to ABKCO. The district court found that because no renewal registrations were ever filed, the Johnson versions of SBD and LIV irrevocably entered the public domain in 1966 and 1967, 28 years after they were first published by the release of Johnson's recordings.

On appeal, the Ninth Circuit reversed, finding that *La Cienega* was "aberrational" and that *Rosette* was the

---

3. Subsections (b) and (c) specifically make the amendments contained in Sections 1 and 12(b)(1) of the Act retroactive. All other provisions, including the amendment to § 303(b) apply only from the date they are enacted.

"accepted and controlling interpretation" of the 1909 Act, despite this Court's denial of certiorari of the *LaCienega* decision. The Ninth Circuit found that the 1997 amendment clarified the law, that the distribution of phonorecords to the public did not constitute publication under the 1909 Act, and that the 1997 amendment of § 303(b) of the Copyright Act applies retroactively to this case. As a result of the Ninth Circuit decision, Johnson's versions of SBD and LIV were not published when they were released on phonorecords in 1938 and 1939 and thus not injected into the public domain 28 years later due to a failure to renew the copyrights since they were never published. This potentially retroactively makes ABKCO's versions infringements, some thirty years after they were created.[4]

Contrary to the Ninth Circuit's holding, the amendment of § 303(b) constituted a complete departure from prior law and thus changed, not clarified, pre-existing law. In addition, the amendment would have a retroactive effect proscribed by the Supreme Court in *Landgraf* if applied to this case, retroactively making derivative works, lawfully created by Mick Jagger and Keith Richards and The Rolling Stones almost 30 years ago, infringements. The amendment of § 303(b) explicitly provides that it does not take effect until enactment — while other provisions in the 1997 Act expressly provide for retroactive application. Thus, under applicable law, the amendment should not have been applied to this case. It should only be applied prospectively to cases filed after the amendment took effect. The Ninth Circuit's holding raises serious federal questions which are appropriate for review by this Court.

---

4. The claimed copyrights in the Johnson versions of LIV and SBD were not obtained until 1991. By that time, ABKCO's versions, recorded only by The Rolling Stones, had been in continuous release for over twenty (20) years.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S HOLDING THAT THE RECENT AMENDMENT TO § 303 OF THE COPYRIGHT APPLIES RETROACTIVELY TO PENDING CASES RAISES IMPORTANT FEDERAL QUESTIONS

A. *La Cienega* Was Consistent With Pre-Existing Law and Therefore The Amendment Changed, Not Clarified, Existing Law

In finding that the 1997 amendment is applicable to this pending case, the Ninth Circuit held that the 1997 amendment simply clarified, not changed, existing law and thus the strong presumption against retroactivity is not applicable to this case. In so finding, the Ninth Circuit held that *La Cienega* — which followed well-established law in finding that musical compositions created under the 1909 Act were "published" when distributed on phonorecords — was "aberrational" and that *Rosette* was the "accepted and controlling interpretation" of the 1909 Act. (App. A at 16a). In making this determination, the Ninth Circuit relied almost exclusively on the House Report on the 1997 amendment and excerpts from the Congressional Record that contained statements of certain Representatives and Senators (most of whom sponsored the amendment) as to the "meaning" of the 1909 Act and the effect that the 1997 amendment had on preexisting law. (App. A at 14a-16a).

By relying almost exclusively on the irrelevant — and inaccurate — opinions of Congressmen as to the meaning of the 1909 Act — an act passed long before any of the current

Congressmen were born and which did not define the concept of publication — and the legislative history of the 1997 amendment, the Ninth Circuit ignored the substantial authority cited by ABKCO in its Appeal Brief which conclusively demonstrated that *Rosette* was in fact the minority view and the 1997 amendment completely changed the existing law. For example, the leading authorities on Copyright Law all agree that the distribution of phonorecords properly constituted publication of the underlying compositions under the 1909 Act. As Professor Nimmer wrote:

> The courts in applying the 1909 Act, were in most instances unpersuaded by the argument that no publication occurs by virtue of the sale of a phonorecord because the record is not a "copy" of the work recorded. On the contrary, the relatively few courts that considered the question were almost unanimous in determining that public sale or other distribution of phonorecords *does* constitute a publication and hence a divestment of common law rights in the works recorded. This conclusion is certainly consistent with the common understanding of the term "copy." Moreover, it is in accord with the underlying rationale of the publication doctrine. That is, an author in permitting records of his work to be publicly marketed is certainly engaging in a form of exploitation of his work and should therefore be required to seek protection, if at all, only under

> the limited monopoly concept of the federal Copyright Act.

1 *Nimmer on Copyright* (1992) § 4.05[B], at 26-27.[5]

Among the cases analyzed by Professor Nimmer for the foregoing proposition are *Biltmore Music Corp. v. Kittinger*, 238 F.2d 373 (9th Cir.), *cert. denied*, 352 U.S. 954, 77 S. Ct. 327 (1956) (failure to file notice of use for release on phonorecord, under the 1909 Act, 17 U.S.C. § 1(e), precluded infringement claim); *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681 (S.D. Cal. 1958) (release on phonorecord constituted "publication" under the 1909 Copyright Act); *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950) (release on phonorecord constituted "publication" under the 1909 Copyright Act); *Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54 (S.D.N.Y. 1954) (manufacture and sale of phonorecords constituted "publication"). In contrast, the Ninth Circuit cited only to *Rosette*.

Although the Ninth Circuit mentioned these cases in a footnote, it dismissed them, with no explanation, as "a handful of district court opinions holding that release of a phonorecord published the underlying work." (App. A at 11a). Without addressing these numerous holdings, the Court below simply concluded, without precedent, that "*Rosette* remained the leading case" until *LaCienega*. (App. A at 11a).

---

5. Professor Goldstein fully agrees with Professor Nimmer that the public distribution of phonorecords constituted publication of the compositions embodied thereon under the 1909 Act. 1 *Goldstein, Copyright* (1989) § 3.2.2, at 246.

In support of its finding that *Rosette* was "the leading case," the Court below erroneously stated that ". . . *Rosette* was the only precedential interpretation [of "publication" under the 1909 Act] until ours [*La Cienega*] in 1995." (App. A at 11a). In reaching this decision, the Ninth Circuit failed to address the substantial authority cited by ABKCO and cited by the authorities that criticized *Rosette*. Moreover, *Rosette* is not the only relevant authority since 1976. Prior to the Ninth Circuit's repudiation of *Rosette*, in 1979, the Sixth Circuit also found that the public distribution of phonorecords constituted "publication" in an unpublished decision, *Leeds Music Corp. v. Gusto Records, Inc.*, 601 F.2d 589, 1979 U.S. App. Lexis 13834 (6th Cir. 1979):

> In a careful opinion filed in the district court on January 19, 1977, United States District Judge L. Clure Morton declined to apply *Rosette v. Rainbo Record Manufacturing Corp.*, 354 F. Supp. 1183 (S.D.N.Y. 1973), *affirmed*, 546 F.2d 461 (2d Cir. 1976) (affirmed on the basis of District Judge Gurfein's opinion). Judge Morton specifically disagreed with Judge Gurfein's holding that a sound recording could not under then-existing copyright law be a "copy" of the underlying composition. Judge Morton further distinguished *Rosette* on the basis of the evidence before him that Ray Pinkston had never in the first instance prepared a written manuscript of the underlying monologue and that, therefore, the tape itself was properly an original and not a copy. We agree.
>
> After hearing the evidence, Judge Morton concluded that the rights to "Phone Call from

> Heaven" were in the public domain because plaintiff Pinkston and her husband had authorized a general unrestricted reproduction and publication of the recording . . .
>
> Upon a careful review, *the court is of the opinion that the district judge properly rejected the Rosette case as an applicable rule of copyright law*. The court is further of the opinion that the district judge's findings concerning the distribution and dissemination of the tape recordings and concerning the non-originality of the Jordan version of the original monologue are not clearly erroneous. (emphasis supplied).[6] 960 F. Supp. at 1307.

What the Ninth Circuit failed to address was that *Rosette* was almost universally criticized and was never followed by any other Court (except for the grudging adherence to *Rosette* in *Jones v. Virgin Records, Ltd.*, 643 F. Supp. 1153 (S.D.N.Y. 1986)). Indeed, *Rosette* has been misunderstood and was itself inconsistent with applicable Second Circuit precedent. Since 1940, the Second Circuit had recognized that the release of a phonorecord constituted a "publication" sufficient to divest any common law property rights. *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 88-89 (2d Cir.), *cert. denied*, 311 U.S. 712, 612 S. Ct. 393 (1940) (Hand, J.).[7]

---

6. Here too, there is no evidence that there was ever any other Johnson version of LIV or SBD except for the phonorecords.

7. The Second Circuit's decision in *Rosette*, which ignored Judge Hand's decision, reflected the mistaken belief that the issue would be mooted by the recent passage of the 1976 Copyright Act.

While ignoring this precedent, the District Court in *Rosette* [354 F. Supp. 1183 (S.D.N.Y. 1973)] recognized the potential constitutional problems that could flow from its decision. It "solved" these problems by truncating common law protection for phonorecords. Referring to constitutional limitations and the federal preemption of common law rights under the "Sears-Compco doctrine [*Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S. Ct. 784 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 84 S. Ct. 779 (1964)]", the District Court held:

> To avoid the constitutional problem I think that the exception of Section 2 of the Copyright Law must be limited to exclude the sale of phonograph records from the protection given to the owner of an unpublished manuscript to the extent that the common law right exceeds the right of statutory copyright owners. The conditions for use of the musical composition on phonograph records are so well defined in the comprehensive Copyright Act of 1909 that it is unlikely that the Congress intended that contradictory principles of State law should survive. 354 F. Supp. at 1193.

Thus, while *Rosette* held that publication did not occur with the distribution of phonorecords so as to trigger application of the Copyright Act, "publication" did occur so as to trigger a contraction of common law rights to correspond to the statutory rights provided by the 1909 Copyright Act. Under this construct, common law protection for the Johnson versions of SBD and LIV would have expired in 1966 and 1967 and they still would have entered the public domain.

In finding that the 1997 amendment "simply clarifie[d] what the meaning of the 1909 Act was all along. . .", the Court below relied almost exclusively on the House Report and statements of certain Senators.[8] (App. A at 14a). The opinions of certain members of the current Congress as to the intent of the Congress which enacted the 1909 Act, however, is palpably improper and "hazardous." *United States v. Price*, 361 U.S. 304, 313, 80 S. Ct. 326, 332 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *see also*, *O'Gilvie v. United States*, 519 U.S. 79, 117 S. Ct. 452, 458 (1996) ("[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute."); *Fowler v. Unified School District No. 259*, 128 F.3d 1431, 1436 (10th Cir. 1997); *see also*, *Marbley v. Bane*, 57 F.3d 224, 231 (2nd Cir. 1995) (court refused to rely on statements of Senators as to meaning of amendment). This is particularly true where the Congress in 1909 did not define the term "publication," leaving it to the Courts to determine and where the body of law developed over nearly a century defined the term almost universally the same, *Rosette* excepted. Thus, the Ninth Circuit's reliance on the opinions of Congressmen as to the "true" meaning of the 1909 Act violated previous rulings of this Court.

Moreover, most of the statements relied upon by the Ninth Circuit in determining the "meaning" of the

---

8. For example, the court cited Senator Leahy who stated that the bill "was intended to clarify the Copyright Law of 1909. . ." (App. A at 15a). "Clarifying" a law that no longer exists, the effect of which is only to dictate how the Courts are to interpret the meaning of the term "publication," which was not defined in the 1909 Act but only by the Courts, would not appear to be a true "clarification." It is plainly a pure amendment.

1997 amendment were those of the legislation's sponsors, such as Senators Leahy, Hatch and Coble. This Court has expressly eschewed reliance on the statements of sponsors of a particular legislation. *Weinberger v. Rossi*, 456 U.S. 25, 35, n.15, 102 S. Ct. 1510, 1517, n.15 (1982) ("The contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history"); *see also*, *Marbley*, 57 F.3d at 231; *Butts v. City of New York Dep't of Housing*, 990 F.2d 1397, 1405 (2nd Cir. 1993) (citing *Weinberger*).[9]

Beyond reference to the mistaken views of some members of Congress, the Court below made no attempt to justify its conclusion that the amendment merely clarified pre-existing law. In so doing, the Court below committed error which retroactively impacts upon the property rights of ABKCO and other copyright owners.

Accordingly, by ignoring the substantial pertinent precedent and instead relying solely on the irrelevant House Report and legislative history, the Ninth Circuit erroneously concluded that *Rosette* reflected prior law and misunderstood its holding. *Rosette* aside, under the law as it existed prior to the 1997 Act, the Johnson versions of SBD and LIV were published when they were distributed on phonorecords and passed into the public domain in 1966 and 1967 respectively.

---

9. Moreover, the Ninth's Circuit's reliance on Congress' interpretation of the law as it existed at the time of the amendment raises potential separation of powers issues. Congress' interpretation of the law is irrelevant. It is for the Courts, not Congress, to interpret the legal precedents and statutory authority as it applies to a particular case. *See e.g.*, *Marbury v. Madison*, 5 U.S. 137, 178, 2 L. Ed. 2d 60 (1803); *Ribando v. United Airlines, Inc.*, 787 F. Supp. 827, n.8 (N.D. Ill. 1992).

The amendment of § 303(b) did not "clarify" pre-existing law. It changed the law.

B. New Laws, Absent Congressional Mandate To The Contrary, Are To Be Applied Prospectively

For nearly two hundred years, the Supreme Court has consistently held that, unless Congress clearly and unequivocally requires otherwise, a new law may only be applied prospectively. *United States v. Heth*, 7 U.S. 399, 3 Cranch 399, 408 (1806) ("[u]nless, therefore, the words are too imperious to admit of a different construction, [the Court should restrict] the words of the law to future operation"); *Murray v. Gibson*, 56 U.S. 421, 423 (1853); *Shwab v. Doyle*, 258 U.S. 529, 537, 42 S. Ct. 391 (1922); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S. Ct. 468 (1988); *Landgraf, supra*; *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059 (1997). As the district court properly determined, Congress did not "clearly and unequivocally" require retroactive application of the amendment of § 303(b).

In *Landgraf*, this Court articulated the standards to be applied in determining whether to apply a new law to pending cases. This Court held that new laws providing solely for prospective relief (i.e., injunctions), laws modifying jurisdiction or procedural rules may be applied in pending cases. 114 S. Ct. at 1502. However, laws having genuine retroactive effect may not be applied retroactively:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress

> has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.*

114 S. Ct. at 1505 (emphasis supplied.)[10]

The amendment of § 303(b) will have a proscribed retroactive effect if applied to this case. Were the amendment applicable, the works lawfully created by Jagger and Richards and The Rolling Stones in 1969 and 1972 (and continuously exploited since then) could retroactively become infringements."[11] ABKCO, Jagger, Richards, The Rolling Stones and all of their licensees could retroactively become liable for damages for an infringement that was never an infringement until the amendment was enacted.[12] *Landgraf* proscribes this result and the district

---

10. Simply stated, if a new law would not have true retroactive effect (i.e., would not impact upon primary conduct) it may be applied retroactively. However, if a new law would have true retroactive effect (i.e., would impact upon primary conduct) it may not be applied retroactively.

11. Assuming LaVere can prove Johnson's authorship.

12. In fact, LaVere has sued Virgin Records, ABKCO's licensee, for infringement.

court properly found the 1997 amendment not applicable to this case.

The Ninth Circuit reasoned that the amendment of § 303(b) is, by definition, retroactive ". . . because it explicitly applies to conduct occurring before January 1, 1978" and Congress "made no exception for musical compositions at issue in cases pending at the time of the statute's enactment." (App. A at 17a). However, the only recordings to which the amendment could possibly apply are those released before the effective date of the 1976 Copyright Act because publication no longer determined copyright status for recordings released after January 1, 1978. The fact that the amendment applies to such recordings thus has nothing to do with whether the amendment may be applied to pending cases. Nor does the fact that the amendment applies to pre-1978 recordings mean that all works previously found to be in the public domain (i.e., "Boogie Chillen" in *La Cienega*) would now be retroactively restored to copyright status. If Congress had intended such result, it would have made the amendment retroactive to the passage of the 1909 Copyright Act.[13] However, Congress did not do so. Instead, Congress simply decreed that "effective on enactment" (November 13, 1997), any work previously published by being embodied on a phonorecord released prior to January 1, 1978 will no longer be deemed to have been published. There is no mandate to apply the amendment retroactively. Prospective application would only immunize works involved in pending cases. As such, under *Landgraf*, it cannot be applied in this case.

---

13. Alternatively, since Congress mistakenly believed that *La Cienega* changed existing law, it would have made the amendment retroactive to the date prior to the *La Cienega* decision.

The Ninth Circuit's holding also ignores well-established principles of statutory construction. As this Court noted in *Landgraf*, the courts have construed the language "take effect on enactment" to preclude application to pending cases. 114 S. Ct. at 1493. The courts presume that Congress acted with knowledge of relevant judicial decisions. *Cannon v. University of Chicago*, 441 U.S. 677, 696-704, 99 S. Ct. 1946 (1979); *Jeffries v. Wood*, 114 F.3d 1484, 1495 (9th Cir.), *cert. denied*, 522 U.S. 1008, 118 S. Ct. 586 (1997). When Congress passed the amendment to § 303(b), it was well aware of Supreme Court precedent (including *Landgraf*) that new laws will not be given retroactive effect absent a clear and unequivocal statement from Congress. One may well assume that the reason Congress chose not to proceed with an exception for pending cases, present in earlier versions of the amendment, is because it recognized that making the amendment take effect on enactment would have that consequence under Supreme Court precedent.

In his concurring opinion in *Landgraf*, Justice Scalia specifically stated that " '[S]hall take effect upon enactment' is presumed to mean 'shall have prospective effect upon enactment,' and that presumption is too strong to be overcome by any negative inference . . .' " 511 U.S. at 288.

Here, Congress did specifically make two sections of the 1997 Act retroactive. (App. D at 46a). In contrast, it made all other sections, including the amendment of § 303(b), effective only upon enactment. In precisely the same circumstances, this Court recently rejected retroactive application of a portion of the Antiterrorism and Effective Death Penalty Act of 1996, holding that Congressional provision for retroactive application of a part of a statute

but not for another part of the statute precluded retroactive application for the part not specifically made retroactive. *Jeffries v. Wood*, *supra* at 1495-1496.

Finally, the Ninth Circuit's reliance on the Sixth Circuit's decision in *Mayhew v. Allsup*, 166 F.3d 821 (6th Cir. 1999) is misguided. The *Mayhew* court expressly acknowledged that the parties had not briefed the issue of whether or not the 1997 amendment is applicable to pending cases. The issue of whether or not the 1997 amendment clarified or changed existing law was thus not addressed by the parties. Nor was it addressed or decided by the court. Therefore, the *Mayhew* court did not have the benefit of the parties' analysis of *Rosette* or the presentation of Supreme Court precedent which cautions against retroactivity. Nor did the court employ any independent analysis of Supreme Court precedent. Instead, the *Mayhew* court simply looked at the language of the statute as amended and determined that, since the statute only applies to records distributed prior to January 1, 1978, it must be construed as to apply to pending cases. However, as stated *supra*, the fact that the statute only applies to records distributed prior to January 1, 1978 has nothing to do with whether the amendment may be applied retroactively to pending cases.

Thus, contrary to the Ninth Circuit's decision, the amendment of § 303(b) was not a "clarification." It was, in the purest sense, an amendment that marked a complete departure from pre-existing law and, under this Court's decisions, can not be applied retroactively to pending cases.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD S. ZAKARIN
Counsel of Record
ILENE S. FARKAS
PRYOR CASHMAN SHERMAN & FLYNN LLP
Attorneys for Petitioner
410 Park Avenue
New York, New York 10022
(212) 421-4100

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JUNE 26, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-56145
D.C. No. CV-95-07682-TJH

ABKCO MUSIC, INC.,

Plaintiff-counter-defendant-Appellee,

v.

STEPHEN LAVERE, as an individual, dba King of Spades Music; DELTA HAZE, INC., in its corporate capacity, dba King of Spades Music; MIMOSA RECORDS PRODUCTIONS, INC., in its corporate capacity, dba King of Spades Music,

Defendants-counter-claimants-Appellants.

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., Chief District Judge, Presiding

Argued and Submitted
February 8, 2000 — Pasadena, California

Filed June 26, 2000

Appendix A

Before: Pamela Ann Rymer and Raymond C. Fisher, Circuit Judges, and Lloyd D. George, Senior District Judge.*

Opinion by Judge Rymer

* * *

OPINION

RYMER, Circuit Judge:

The ultimate question in this case is whether a phonorecord distributed in the late 1930s "published" the underlying work such that the clock started ticking under the Copyright Act of 1909.[1] In La Cienega Music Co. v.

---

* Honorable Lloyd D. George, Senior United States District Judge for the District of Nevada, sitting by designation.

1. Under the 1909 Act, a properly registered artistic work receives copyright protection for 28 years from the date of first publication, renewable once for another 28 years. See Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075, 1080. The Copyright Act of 1976 amended the 1909 Act (effective January 1, 1978) in ways that are not material to this case. Prior to the 1997 amendment, § 303 provided:

> Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such work expire before December

(Cont'd)

ZZ Top, 53 F.3d 950 (9th Cir. 1995), we held that it did. However, in 1997 Congress amended the Copyright Act to provide that distribution of a phonorecord before January 1, 1978 shall not constitute a publication of the musical work. See 17 U.S.C. § 303(b). This action (for declaratory relief that a record released in 1938-39 is in the public domain) was filed after La Cienega but before the amendment. Thus, the appeal turns on which controls: La Cienega or the 1997 amendment to the Copyright Act.

ABKCO Music, Inc., whose library includes two Rolling Stones hits — Love in Vain, released in 1969, and Stop

---

(Cont'd)

> 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

Amended § 303 now provides:

> (a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.
>
> (b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.

Pub. L. 105-80, § 11, Nov. 13, 1997, 111 Stat. 1534; Pub. L. 105-298, Title I, § 102(c), Oct. 27, 1998, 112 Stat. 2827.

Breakin' Down, released in 1972 — sought a ruling that the versions of these two songs recorded by Robert Johnson and distributed on a phonograph in the late 1930s were in the public domain under La Cienega. The district court determined on summary judgment that the Johnson versions of Love in Vain and Stop Breakin' Down irrevocably entered the public domain when the copyrights were not renewed within the last year of the initial 28-year term of copyright protection. Stephen LaVere, Mimosa Records Production, Inc., d/b/a King of Spades Music, and Delta Haze, Inc., who claim legal title to the Johnson copyrights, appeal. We now join the Sixth Circuit in concluding that the 1997 amendment applies to pending cases.[2] Accordingly, § 303(b), rather than La Cienega, controls. We therefore reverse.

I

Robert Johnson, a blues artist, recorded 29 songs before he was murdered in 1938. Sixteen were recorded in a November 1936 session, and, after the 1936 recordings were successfully distributed by Vocalion Records, Johnson returned to the studio in June 1937 to record 13 more songs including Love in Vain and Stop Breakin' Down. Vocalion released Stop Breakin' Down on March 20, 1938 and Love in Vain on February 9, 1939. No copyright registration for either song was filed. In the early 1960s, Columbia Records re-released Johnson's recordings.

In 1969, The Rolling Stones released an album called Let It Bleed, which contained an adapted version of Love in

---

2. See Mayhew v. Allsup, 166 F.3d 821 (6th Cir. 1999).

Vain, and in 1972, the Rolling Stones adapted Stop Breakin' Down for their album Exile on Main Street. ABKCO's predecessor filed a copyright registration on Love in Vain in May 1970 and ABKCO filed a copyright registration claiming protection for The Rolling Stones' adaptation and arrangement of Stop Breakin' Down in 1972.

Meanwhile, LaVere became interested in Johnson's music and by 1974 had located Carrie Thompson, Johnson's sister, who was thought to be his only surviving heir. LaVere agreed to try to generate income from Johnson's legacy and to pay Thompson (on behalf of Johnson heirs) fifty percent of all royalties collected in exchange for her assignment to him of her copyright interests in Johnson's works. LaVere formed King of Spades Music, a publishing company to administer the Johnson compositions and copyrights. Over time he assigned his copyright interests to Mimosa, which in turn assigned them to Delta Haze (whose dba is King of Spades Music).

In 1990, Columbia Records released a two-CD boxed set of Johnson's recordings entitled Robert Johnson — The Complete Recordings. Love in Vain and Stop Breakin' Down were included. It was quite successful. Columbia evidently recognized Johnson's common law copyrights as, eventually, did other successful pop artists who adapted Johnson's works. However, ABKCO did not. LaVere filed a copyright registration for the Columbia release in 1991. In February 1993 Delta Haze demanded that ABKCO cease and desist from unlicensed uses of the Johnson songs. Protracted negotiations followed. When it became clear they were going nowhere and Delta Haze threatened to sue in the summer of

1995, ABCKO filed this action for declaratory relief on November 9, 1995. It sought an order that the Johnson versions of Love in Vain and Stop Breakin' Down are in the public domain under La Cienega. Delta Haze counterclaimed for a declaration that no protectable copyright interest exists in The Rolling Stones' versions of Love in Vain and Stop Breakin' Down and that it, rather than ABKCO, is the sole owner of the legal copyright in these compositions.

Delta Haze moved to dismiss pursuant to Rule 12(b)(7) on the grounds that the Johnson Estate was an indispensable party and that ABKCO lacked standing. Both motions were denied. Each party moved for summary judgment, but before the district court could rule, § 303(b) was signed into law. The district court granted ABKCO's motion, and denied Delta Haze's cross-motion, holding that the Robert Johnson versions of Love in Vain and Stop Breakin' Down irrevocably entered the public domain when the copyrights were not renewed within the last year of the initial 28-year term of copyright protection.

Delta Haze timely appealed.

II

We first address two arguments advanced by Delta Haze that would require dismissal, if correct.

A

Delta Haze contends that ABKCO lacks standing because it did not allege ownership and registration with

respect to Stop Breakin' Down as well as Love in Vain, and averred that it filed this action on account of a threatened suit for infringement arising only from Love in Vain. We disagree that the complaint's failure specifically to mention Stop Breakin' Down matters, for the record shows that ABKCO in fact filed a copyright registration (No. Eu 326810) on Stop Breaking Down April 27, 1972 as an "adaptation of words & music of a work in P.D." The registration reflects Mick Jagger and Keith Richard as authors. Further, the record shows that from Delta Haze's February 22, 1993 letter on, both parties understood the dispute to involve all Johnson works recorded by the Rolling Stones, including Stop Breakin' Down as well as Love in Vain. Suit was clearly threatened in June and August of 1995. Therefore, when ABKCO filed its action for declaratory relief on November 9, 1995, there was an actual controversy with respect to rights in the Johnson works sufficient to confer standing. See, e.g., Coral Constr. Co. v. King Co., 941 F.2d 910, 929 (9th Cir. 1991) (a plaintiff seeking declaratory relief must show a very significant possibility of future harm for standing); Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555-56 (9th Cir. 1989) (for standing a plaintiff must have a real and reasonable apprehension that he will be subject to liability if he continues to manufacture his product).

B

Delta Haze also argues that ABKCO's action should have been dismissed for failure to join the Johnson Estate, the beneficial owner of the copyrights, as an indispensable party under Rule 19 of the Federal Rules of Civil Procedure.

Although the transactions are not entirely clear, it appears from LaVere's declaration that the Johnson Estate acknowledged his agreement with Johnson's sister, and that he and the Administrator of the Johnson Estate entered into a contract whereby the Estate authorized LaVere to act as the Estate's agent for purposes of exploiting the Johnson copyrights (as he had with Thompson) in exchange for LaVere's remitting fifty percent of the royalties received from the boxed set of Johnson compositions. He has been doing so for years. Nothing in the record suggests that the Estate's interests diverge from LaVere's, or Delta Haze's, with respect to anything at issue in this lawsuit, or that LaVere does not adequately represent whatever interests the Estate has; they are the same as his in establishing that the Johnson copyrights did not fall into the public domain before the Columbia release in 1990. Under these circumstances, we do not see how the district court could have abused its discretion in declining to find the Estate indispensable.

III

Turning to the central issue on appeal, Delta Haze argues that applying § 303(b) to this case presents no retroactivity problem because Congress was clarifying, not changing, the law when it affirmed through § 303(b) that "[t]he distribution of a phonorecord before January 1, 1978 shall not for any purpose constitute a publication of the musical work embodied therein." ABKCO sees the amendment to § 303 as a departure which changed prior law and whose application to a pending case would have an impermissible retroactive effect under Landgraf v. USI Film Products, 511 U.S. 244 (1994). Delta Haze disagrees that, even if retroactivity

analysis is required, the amendment is retroactive because Congress expressly prescribed its reach "for any purpose" to all releases of phonorecords before January 1, 1978.

A

This issue has a long history, stretching back to 1831, when Congress first extended copyright protection to original musical compositions. At that time, there was no technology for mechanically reproducing music, and Congress merely protected the copying of the sheet music. See Goldstein v. California, 412 U.S. 546, 564 (1973). But in the latter half of the nineteenth century, piano rolls were invented. They were an early form of mechanical reproduction of specific musical performances, which the Supreme Court held in 1908 did not constitute a "copy" of the copyrighted musical composition because they were not written or printed in tangible form. White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 17 (1908). Put another way, piano rolls were a performance, rather than a publication, of a musical composition. A year after White-Smith, Congress passed the 1909 Copyright Act, giving composers of musical compositions control over recordings of their creations. See Goldstein, 412 U.S. at 565-66. However, the intent of Congress in the 1909 Act was not to accord recordings the same copyright status as a written score, but

> only to establish the limits of the composer's right; composers were to have control over the recordings themselves. Nowhere does the report indicate that Congress considered records as anything but a component part of a machine,

> capable of reproducing an original composition, or that Congress intended records, as renderings of original artistic performance, to be free from state control.

Id. at 566 (emphasis in original). The 1909 Copyright Act governed rights in musical compositions until January 1, 1978 (the effective date of the 1976 Copyright Act). See La Cienega, 53 F.3d at 952 n.1.

"Under the 1909 Act, an unpublished work was protected by state common law copyright from the moment of its creation until it was either published or until it received protection under the federal copyright scheme." Id. at 952. When a work was published, it lost common law protection. See id. at 953. The owner could obtain federal protection for the published work by complying with the 1909 Act's requirements; otherwise, the work entered the public domain. See Twin Books Corp. v. Walt Disney Co., 83 F.3d 1162, 1165 (9th Cir. 1996). Under § 9 of the 1909 Act, "[a]ny person . . . may secure copyright for his work by publication thereof with the notice of copyright required by this title." Id.

The 1909 Act did not define the term "publication"; however, the Second Circuit held in Rosette v. Rainbo Record Mfg. Corp., 546 F.2d 461 (2d Cir. 1976), that the sale of phonorecords in the 1950s did not constitute publication. As explained more fully by the district court, Rosette v. Rainbo Record Manufacturing Corp., 354 F. Supp. 1183 (S.D.N.Y. 1973), the drafters of the 1909 Act did not intend to extend copyright protection to mechanical reproductions of musical compositions; rather, they intended

"only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such [mechanical reproductions]." Id. at 1190 (quoting House Reports, 60th Cong. 2d Sess., Vol. 1, at 9 (1909)). Therefore, the 1909 Act did not overrule White-Smith, see id. at 1191, and "a performance of an unpublished musical manuscript [on a phonograph record] is not a publication." Id. at 1190. As the court noted, this "accords with the expressed view of the Copyright Bar and the music industry." Id.

Apart from a handful of district court opinions holding that release of a phonorecord published the underlying work,[3] Rosette remained the leading case until we rendered our decision in La Cienega in 1995. There, La Cienega Music Company accused the band ZZ Top and others of copying a song it owned called "Boogie Chillen." La Cienega had released recordings of different versions of this song in 1948, 1950, and 1970; ZZ Top released an album in 1973 with a song it called "La Grange" that was similar to Boogie Chillen and became ZZ Top's signature song. Its position was that La Cienega's release of Boogie Chillen on phonorecords was a publication; La Cienega argued that publication of the songs did not occur until it filed a notice of copyright with the Copyright Office in 1967, 1970, and 1992 respectively. See

---

3. See McIntyre v. Double-A Music Corp., 166 F. Supp. 681 (S.D. Cal. 1958) (release on phonorecord constituted publication under the 1909 Copyright Act); Shapiro, Bernstein & Co. v. Miracle Record Co., 91 F. Supp. 473 (N.D. Ill. 1950) (release of phonorecord published the musical work); Mills Music, Inc. v. Cromwell Music, Inc., 126 F. Supp. 54 (S.D.N.Y. 1954) (manufacture and sale of phonorecords was a publication).

La Cienega, 53 F.3d at 953. We declined to follow Rosette, holding instead that selling a recording constitutes "publication" under the Copyright Act of 1909.

However, in November 1997, the Copyright Act was amended to provide that "[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein." 17 U.S.C. § 303(b); see Pub. L. No. 105-80, 111 Stat. 1529 (November 13, 1997). As we have previously observed, "the result of our holding in La Cienega has been subsequently changed by Congress' passage and enactment of [the amendment]." Batjac Productions Inc. v. Goodtimes Home Video Corp., 160 F.3d 1223, 1235 (9th Cir. 1998).

There is no dispute that if La Cienega applies to this case, the Johnson songs were published in 1938 and 1939 when they were released on phonorecord. The 28-year period of copyright protection under the 1909 Act would have begun to run at that time, expiring in 1966 and 1967. Since the copyrights were not renewed for a second 28-year term, the songs would have passed into the public domain. If, on the other hand, § 303(b) applies, the Johnson songs would not have been published until the 1990 Columbia release was copyrighted. The 28-year period for copyright protection would not have been triggered until then; Johnson's copyrights would not have run out in 1967-68; and neither Love in Vain nor Stop Breakin' Down would be in the public domain.

Thus, the question that matters is whether § 303(b) is retroactive.

LaVere contends that we need not be concerned with retroactivity at all, because the purpose and effect of § 303(b) was to clarify, rather than to change, existing law. We have long recognized that clarifying legislation is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of its enactment:

> If [the statute] were to be characterized in the latter fashion [as a "substantial change in the law"], its retroactive application would pose a series of potential constitutional problems. If however [the statute] merely clarifies what [the prior statute] was originally intended to mean . . . it has no retroactive effect that might be called into constitutional question.

Beverly Community Hosp. Ass'n. v. Belshe, 132 F.3d 1259, 1265 (9th Cir. 1997). "Normally, when an amendment is deemed clarifying rather than substantive, it is applied retroactively." United States v. Donaghe, 50 F.3d 608, 612 (9th Cir. 1994). "Given the extraordinary difficulty that the courts have found in divining the intent of the original Congress, a decision by the current Congress to intervene by expressly clarifying the meaning of [the statute] is worthy of real deference . . . . We therefore honor Congress' 'clarification' label and accept [the new] provisions as a statement of what [the statute] has meant all along." Beverly Community Hosp., 132 F.3d at 1266.

Appendix A

There is a good argument that the 1997 amendment simply clarifies what the meaning of the 1909 Act was all along — namely, that the distribution of phonorecords did not constitute publication of the underlying works. As the House Report on the 1997 amendment indicates, the bill that resulted in § 303(b) "affirms that the distribution of a phonorecord to the public before January 1, 1978 did not constitute publication of a musical composition embodied in that phonorecord under the 1909 Copyright Act. It is intended to restore the law to what it was before the decision of the Ninth Circuit Court of Appeals in La Cienega Music Co. v. Z.Z. Top." H.R. Rep. No. 105-325, at 5 (1997). Thus, the Report states, § 303(b) "reverses the La Cienega decision and affirms in the Copyright Act that a phonorecord released before 1978 did not constitute a 'publication' under the 1909 Copyright Act." Id. The Report also notes that the amendment comports with the long-standing interpretation of the Copyright Office that release of a phonorecord was not a "copy" for purposes of the Act, and the Congressional Budget Office opined that the bill would have no fiscal impact because it "would confirm the Copyright Office's treatment of pre-1978 musical compositions." Id. at 4. In sum, the Report concludes:

> The La Cienega decision has, therefore, placed a cloud over the legal status of a large number of musical works recorded and sold before January 1, 1978. Moreover, it has called into question the long established interpretation of the Copyright Office. It is the intent of this section to remove the cloud and bring the law into conformity with

> the Second Circuit opinion and Copyright office practices.

Id. at 5.

Members of Congress expressed the same view. For example, Senator Leahy, a Senate co-sponsor, said the bill "was intended to clarify the Copyright Law of 1909 on an issue that has become a matter of increasing litigation in a number of Federal Circuits since the Ninth Circuit decision in the ZZ Top case." 143 Cong. Rec. S11498 (1997). Senator Hatch, also a sponsor and Chair of the Senate Judiciary Committee, remarked that "Rosette comports with the nearly universal understanding of the music and sound recording industries and of the Copyright Office"; "overturning the La Cienega decision will restore national uniformity on this important issue by confirming the wisdom of the custom and usage of the affected industries and of the Copyright Office for nearly 100 years." 143 Cong. Rec. S11301 (1997). Similarly on the House side, Representative Coble, who sponsored the legislation and chaired the House Judiciary Committee Subcommittee on Courts and Intellectual Property, introduced the bill on the floor by explaining that it "clarifies that the distribution of a phonorecord before January 1, 1978, did not constitute a publication of the musical work embodied therein." 143 Cong. Rec. H9882 (1997). Representative Bono stated that the bill was needed because La Cienega "has jeopardized the private property rights for thousands of creative individuals who live within the jurisdiction of the Federal Court of Appeals of the Ninth Circuit." 143 Cong. Rec. H9882 (1997). And Representative Berman noted that composers had "rel[ied] on an industry

standard of many decades duration," a "long-time understanding of copyright law [which] has been ratified and reaffirmed by the Second Circuit." "The La Cienega decision took that settled law and cast it on its head, threatening to thrust into the public domain hundreds of thousands of musical works which presently enjoy copyright protection." 143 Cong. Rec. H9882 (1997).

From this record it is evident that Congress believed La Cienega was aberrational, that Rosette was the accepted and controlling interpretation, and that § 303(b) was enacted to make this clear. ABKCO points out that even if this is so, and even assuming that § 303(b) "clarified" that the Second Circuit's construction in Rosette was correct, the effect was to change the law in the Ninth Circuit. Of course this is literally true, but the policy of the Copyright Office had always been that distribution of a phonorecord before 1978 does not publish the underlying musical composition, and Rosette was the only precedential interpretation until ours in 1995. Once we created a circuit split, Congress acted to make clear that "publication" in the 1909 Copyright Act, which it did not define in the Act itself, meant what Rosette and the Copyright Office said it meant with respect to mechanical reproductions such as phonorecords. An amendment in the face of an ambiguous statute or a dispute among the courts as to its meaning indicates that Congress is clarifying, rather than changing, the law. See, e.g., Bedoni v. Navajo-Hopi Indian Relocation Comm'n., 878 F.2d 1119, 1121 (9th Cir. 1989) ("Where, as here, an act is ambiguous, an amendment thereto is an indication that it is intended to clarify, rather than change, the existing law.") (citation, internal quotations, and alterations omitted); Callejas v.

McMahon, 750 F.2d 729, 731 (9th Cir. 1984) ("The mere fact of an amendment itself does not indicate the legislature intended to change a law . . . . [A] dispute or ambiguity, such as a split in the circuits, is an indication that a subsequent amendment is intended to clarify, rather than change, the existing law.") (citations, internal quotations, and alterations omitted). It follows that the 1997 amendment to § 303 was a "statement of what [the 1909 Copyright Act] has meant all along." Beverly Community Hosp., 132 F.3d at 1266. As such, no retroactivity problem is presented by applying it to this case.

However, ABKCO insists that § 303(b) cannot be applied to its pending case without running afoul of Landgraf because Congress did not clearly and unequivocally require retroactive application. It suggests that nothing can be inferred from the fact that the only recordings to which the amendment could possibly apply were those released before 1978, because publication no longer determined copyright status for recordings released after 1978; nor does declaring that the amendment "take effect on enactment" imply that it should apply to pending cases. We do not agree. Section 303(b) would make no sense if it were to be applied solely prospectively, because it explicitly applies to conduct occurring before January 1, 1978. Congress unequivocally declared that phonorecord distribution prior to January 1, 1978 did not constitute publication of the musical compositions and made no exception for musical compositions at issue in cases pending at the time of the statute's enactment. The Sixth Circuit considered the same problem in Mayhew v. Allsup, 166 F.3d 821 (6th Cir. 1999), and its reasoning is persuasive:

> It is clear from the language employed that § 303(b) should be applied to pending cases. First, the subsection obviously applies to pre-enactment conduct. In fact, it applies only to the distribution of records prior to January 1, 1978. Thus, applying the statute to pending cases has no impact on the conduct that is the subject of the subsection. Second, the subsection provides that the distribution of phonorecords "shall not for any purpose constitute a publication." This court would be defying the express mandate of the statute if it were to decide on de novo review that phonorecord distribution constitutes publication. Finally, the presumption against retroactive application of statutes is based, in part, on a hesitancy to reverse settled expectations. In enacting § 303(b), however, Congress has resolved a problem of unsettled expectations that had arisen from the circuit split. We conclude that § 303(b) should be applied in resolving the present appeal.

Id. at 824 (citations omitted). We agree, and hold that § 303(b) controls. Because § 303(b) controls, the Johnson versions of Love in Vain and Stop Breakin' Down were not in the public domain solely on account of their being released on phonorecords in the 1930s.[4]

---

4. Given our conclusion that § 303(b) applies, we do not reach Delta Haze's argument that even under La Cienega, the district court's grant of summary judgment to ABKCO was improper because there were triable issues of fact regarding whether the songs were released with Johnson's consent or authorization.

Appendix A

IV

Delta Haze also asks for reversal of the district court's denial of its cross-motion for summary judgment and, failing that, argues that judgment should have been granted on its counterclaims. To the extent that its cross-motion is the mirror image of ABKCO's, Delta Haze is entitled to a judgment declaring that the Johnson versions of Love in Vain and Stop Breakin' Down did not enter the public domain when the phonorecords on which they were recorded were released in 1938 and 1939. Beyond this, however, we believe the district court is in a better position than we to sort out the issues that remain. For example, Delta Haze argues that ABKCO can have no ownership interest in The Rolling Stones' versions of the two works because The Rolling Stones added no original material. This may, or may not, raise triable issues — a point that we assume the district court has never considered, given its ruling that the Johnson works were in the public domain when The Rolling Stones made its adaptations.

ABKCO argues that dismissal of Delta Haze's counterclaim was proper because it never threatened to sue for infringement, therefore there was no controversy between them to give the district court subject matter jurisdiction. But we cannot be certain of this, for the counterclaims appear to contest ABKCO's claim to any protectable interest in the adaptation performed by the Rolling Stones. In addition, ABKCO contends that whatever claim Delta Haze might be able to state is time-barred. Again, these issues are best left to the district court on remand.

Because we cannot tell from the district court's order why it dismissed the counterclaims (it could simply have been that the counterclaims necessarily fell given the decision that the Johnson versions were in the public domain), we vacate the order dismissing the counterclaims. In doing so, we intimate no view one way or the other on the merits of the counterclaims or any motions that may be made with respect to them.

To summarize: we reverse the order and judgment granting ABKCO's motion for summary judgment; we order judgment to be entered for Delta Haze that the Robert Johnson versions of Love in Vain and Stop Breakin' Down did not enter the public domain when phonorecords embodying those works were released before 1978; and we vacate the judgment for ABKCO on Delta Haze's counterclaims.

REVERSED and REMANDED.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION DATED MAY 18, 1998 AND FILED MAY 20, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CV 95-7682 TJH (AJWx)

ABKCO MUSIC, INC.,

Plaintiff,

v.

DELTA HAZE INC., *et al.*,

Defendants.

ORDER AND JUDGMENT

The Court has considered the motions for summary judgment by Plaintiff and Defendants, together with the moving and opposing papers.

It is Ordered that Plaintiff's motion for summary judgment be, and hereby is, **Granted**.

It is further Ordered that Defendant's motion for summary judgment be, and hereby is, **Denied**.

It is further Ordered that Plaintiff's motion to file a second amended complaint is moot and, on that basis, be, and hereby is, **Denied**.

It is Ordered, Adjudged and Decreed that judgment be, and hereby is, **Entered**, for Plaintiff and against Defendants on Plaintiff's claims.

It is further Ordered, Adjudged and Decreed that judgment be, and hereby is, **Entered**, for Plaintiff and against Defendants on Defendants' counterclaims.

It is further Ordered, Adjudged and Decreed that the Robert Johnson versions of "Love in Vain" and "Stop Breakin Down" irrevocably entered the public domain when the copyrights were not renewed within the last year of the initial 28-year term of copyright protection.

It is further Ordered, Adjudged and Decreed that Defendants shall take nothing on their counterclaims and each party shall bear its own costs.

Date: May 18, 1998

s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
Chief United States District Judge

APPENDIX C — RELEVANT STATUTE

17 U.S.C. § 303

§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978

(a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

(b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.

APPENDIX D — TECHNICAL AMENDMENTS TO TITLE 17, UNITED STATES CODE, AS ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES ON NOVEMBER 13, 1997

UNITED STATES PUBLIC LAWS
105th Congress — First Session
Convening January 7, 1997

PL 105-80 (HR 672)
November 13, 1997
TITLE 17 TECHNICAL AMENDMENTS

AN ACT to make technical amendments to certain provisions of title 17, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

17 USCA § 119

SECTION 1. TECHNICAL CORRECTIONS TO THE SATELLITE HOME VIEWER ACT OF 1994.

The Satellite Home Viewer Act of 1994 (Public Law 103-369) is amended as follows:

(1) Section 2(3)(A) is amended to read as follows:

"(A) in clause (i) by striking '12 cents' and inserting '17.5 cents per subscriber in the case of superstations that as retransmitted by the satellite carrier include any program which, if delivered by any cable system in the United States, would be subject to the syndicated exclusivity rules of the Federal Communications Commission, and 14 cents per

subscriber in the case of superstations that are syndex-proof as defined in section 258.2 of title 37, Code of Federal Regulations'; and".

(2) Section 2(4) is amended to read as follows:

"(4) Subsection (c) is amended —

"(A) in paragraph (1) —

"(i) by striking 'until December 31, 1992,"

"(ii) by striking '(2), (3) or (4)' and inserting '(2) or (3)'; and

"(iii) by striking the second sentence;

"(B) in paragraph (2) —

"(i) in subparagraph (A) by striking 'July 1, 1991' and inserting 'July 1, 1996'; and

"(ii) in subparagraph (D) by striking 'December 31, 1994' and inserting 'December 31, 1999, or in accordance with the terms of the agreement, whichever is later'; and

Appendix D

"(C) in paragraph (3) —

"(i) in subparagraph (A) by striking 'December 31, 1991' and inserting 'January 1, 1997';

"(ii) by amending subparagraph (B) to read as follows:

" '(B) ESTABLISHMENT OF ROYALTY FEES. — In determining royalty fees under this paragraph, the copyright arbitration royalty panel appointed under chapter 8 shall establish fees for the retransmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions. In determining the fair market value, the panel shall base its decision on economic, competitive, and programming information presented by the parties, including —

" '(i) the competitive environment in which such programming is distributed, the cost of similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;

" '(ii) the economic impact of such fees on copyright owners and satellite carriers; and

" '(iii) the impact on the continued availability of secondary transmissions to the public.'; and

"(iii) in subparagraph (C), by inserting 'or July 1, 1997, whichever is later' after 'section 802(g)'.".

(3) Section 2(5)(A) is amended to read as follows:

"(A) in paragraph (5)(C) by striking 'the date of the enactment of the Satellite Home Viewer Act of 1988' and inserting 'November 16, 1988'; and".

17 USCA § 104A

SEC. 2. COPYRIGHT IN RESTORED WORKS.

Section 104A of title 17, United States Code, is amended as follows:

(1) Subsection (d)(3)(A) is amended to read as follows:

"(3) EXISTING DERIVATIVE WORKS. — (A) In the case of a derivative work that is based upon a restored work and is created —

"(i) before the date of the enactment of the Uruguay Round Agreements Act, if the source country of the restored work is an eligible country on such date, or

"(ii) before the date on which the source country of the restored work becomes an eligible country, if that country is not an eligible country on such date of enactment, a reliance party may continue to exploit that derivative work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph.".

(2) Subsection (e)(1)(B)(ii) is amended by striking the last sentence.

(3) Subsection (h)(2) is amended to read as follows:

"(2) The 'date of restoration' of a restored copyright is —

"(A) January 1, 1996, if the source country of the restored work is a nation adhering to the Berne Convention or a WTO member country on such date, or

"(B) the date of adherence or proclamation, in the case of any other source country of the restored work.".

(4) Subsection (h)(3) is amended to read as follows:

"(3) The term 'eligible country' means a nation, other than the United States, that —

"(A) becomes a WTO member country after the date of the enactment of the Uruguay Round Agreements Act;

"(B) on such date of enactment is, or after such date of enactment becomes, a member of the Berne Convention; or

"(C) after such date of enactment becomes subject to a proclamation under subsection (g).

For purposes of this section, a nation that is a member of the Berne Convention on the date of the enactment of the Uruguay Round Agreements Act shall be construed to become an eligible country on such date of enactment.".

Appendix D

17 USCA § 114

SEC. 3. LICENSES FOR NONEXEMPT SUBSCRIPTION TRANSMISSIONS.

Section 114(f) of title 17, United States Code, is amended —

(1) in paragraph (1), by inserting ", or, if a copyright arbitration royalty panel is convened, ending 30 days after the Librarian issues and publishes in the Federal Register an order adopting the determination of the copyright arbitration royalty panel or an order setting the terms and rates (if the Librarian rejects the panel's determination)" after "December 31, 2000"; and

(2) in paragraph (2), by striking "and publish in the Federal Register".

17 USCA § 115

SEC. 4. ROYALTY PAYABLE UNDER COMPULSORY LICENSE.

Section 115(c)(3)(D) of title 17, United States Code, is amended by striking "and publish in the Federal Register".

Appendix D

17 USCA § 116

SEC. 5. NEGOTIATED LICENSE FOR JUKEBOXES.

Section 116 of title 17, United States Code, is amended —

(1) by amending subsection (b)(2) to read as follows:

"(2) ARBITRATION. — Parties not subject to such a negotiation may determine, by arbitration in accordance with the provisions of chapter 8, the terms and rates and the division of fees described in paragraph (1)."; and

(2) by adding at the end the following new subsection:

"(d) DEFINITIONS. — As used in this section, the following terms mean the following:

"(1) A 'coin-operated phonorecord player' is a machine or device that —

"(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by the insertion of coins, currency, tokens, or other monetary units or their equivalent;

"(B) is located in an establishment making no direct or indirect charge for admission;

"(C) is accompanied by a list which is comprised of the titles of all the musical works available for performance on it, and is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

"(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

"(2) An 'operator' is any person who, alone or jointly with others —

"(A) owns a coin-operated phonorecord player;

"(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

"(C) has the power to exercise primary control over the selection

of the musical works made available for public performance on a coin-operated phonorecord player.".

17 USCA § 411

SEC. 6. REGISTRATION AND INFRINGEMENT ACTIONS.

Section 411(b)(1) of title 17, United States Code, is amended to read as follows:

"(1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and".

17 USCA § 708

SEC. 7. COPYRIGHT OFFICE FEES.

(a) FEE INCREASES. — Section 708(b) of title 17, United States Code, is amended to read as follows:

"(b) In calendar year 1997 and in any subsequent calendar year, the Register of Copyrights, by regulation, may increase the fees specified in subsection (a) in the following manner:

"(1) The Register shall conduct a study of the costs incurred by the Copyright Office

for the registration of claims, the recordation of documents, and the provision of services. The study shall also consider the timing of any increase in fees and the authority to use such fees consistent with the budget.

"(2) The Register may, on the basis of the study under paragraph (1), and subject to paragraph (5), increase fees to not more than that necessary to cover the reasonable costs incurred by the Copyright Office for the services described in paragraph (1), plus a reasonable inflation adjustment to account for any estimated increase in costs.

"(3) Any fee established under paragraph (2) shall be rounded off to the nearest dollar, or for a fee less than $12, rounded off to the nearest 50 cents.

"(4) Fees established under this subsection shall be fair and equitable and give due consideration to the objectives of the copyright system.

"(5) If the Register determines under paragraph (2) that fees should be increased, the Register shall prepare a proposed fee schedule and submit the schedule with the accompanying economic analysis to the Congress. The fees proposed by the

Register may be instituted after the end of 120 days after the schedule is submitted to the Congress unless, within that 120-day period, a law is enacted stating in substance that the Congress does not approve the schedule.".

(b) DEPOSIT OF FEES. — Section 708(d) of such title is amended to read as follows:

"(d)(1) Except as provided in paragraph (2), all fees received under this section shall be deposited by the Register of Copyrights in the Treasury of the United States and shall be credited to the appropriations for necessary expenses of the Copyright Office. Such fees that are collected shall remain available until expended. The Register may, in accordance with regulations that he or she shall prescribe, refund any sum paid by mistake or in excess of the fee required by this section.

"(2) In the case of fees deposited against future services, the Register of Copyrights shall request the Secretary of the Treasury to invest in interest-bearing securities in the United States Treasury any portion of the fees that, as determined by the Register, is not required to meet current deposit account demands. Funds from such portion of fees shall be invested in securities that permit funds to be available to the Copyright Office at all times if they are determined to

be necessary to meet current deposit account demands. Such investments shall be in public debt securities with maturities suitable to the needs of the Copyright Office, as determined by the Register of Copyrights, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities.

"(3) The income on such investments shall be deposited in the Treasury of the United States and shall be credited to the appropriations for necessary expenses of the Copyright Office.".

SEC. 8. COPYRIGHT ARBITRATION ROYALTY PANELS.

17 USCA § 801

(a) ESTABLISHMENT AND PURPOSE. — Section 801 of title 17, United States Code, is amended —

(1) in subsection (b)(1) by striking "and 116" in the first sentence and inserting "116, and 119";

(2) in subsection (c) by inserting after "panel" at the end of the sentence the following:

", including —

"(1) authorizing the distribution of those royalty fees collected under sections 111, 119, and 1005 that the Librarian has found are not subject to controversy; and

"(2) accepting or rejecting royalty claims filed under sections 111, 119, and 1007 on the basis of timeliness or the failure to establish the basis for a claim"; and

(3) by amending subsection (d) to read as follows:

"(d) SUPPORT AND REIMBURSEMENT OF ARBITRATION PANELS. — The Librarian of Congress, upon the recommendation of the Register of Copyrights, shall provide the copyright arbitration royalty panels with the necessary administrative services related to proceedings under this chapter, and shall reimburse the arbitrators presiding in distribution proceedings at such intervals and in such manner as the Librarian shall provide by regulation. Each such arbitrator is an independent contractor acting on behalf of the United States, and shall be hired pursuant to a signed agreement between the Library of Congress and the arbitrator. Payments to the arbitrators shall be considered reasonable costs incurred by the Library of Congress and the Copyright Office for purposes of section 802(h)(1).".

Appendix D

17 USCA § 802

(b) PROCEEDINGS. — Section 802(h) of title 17, United States Code, is amended by amending paragraph (1) to read as follows:

> "(1) DEDUCTION OF COSTS OF LIBRARY OF CONGRESS AND COPYRIGHT OFFICE FROM ROYALTY FEES. — The Librarian of Congress and the Register of Copyrights may, to the extent not otherwise provided under this title, deduct from royalty fees deposited or collected under this title the reasonable costs incurred by the Library of Congress and the Copyright Office under this chapter. Such deduction may be made before the fees are distributed to any copyright claimants. In addition, all funds made available by an appropriations Act as offsetting collections and available for deductions under this subsection shall remain available until expended. In ratemaking proceedings, the reasonable costs of the Librarian of Congress and the Copyright Office shall be borne by the parties to the proceedings as directed by the arbitration panels under subsection (c).".

17 USCA § 1007

SEC. 9. DIGITAL AUDIO RECORDING DEVICES AND MEDIA.

Section 1007(b) of title 17, United States Code, is amended by striking "Within 30 days after" in the first sentence and inserting "After".

Appendix D

17 USCA § 115

SEC. 10. CONFORMING AMENDMENT.

Section 4 of the Digital Performance Right in Sound Recordings Act of 1995 (Public Law 104-39) is amended by redesignating paragraph (5) as paragraph (4).

17 USCA § 303

SEC. 11. DISTRIBUTION OF PHONORECORDS.

Section 303 of title 17, United States Code, is amended —

(1) by striking "Copyright" and inserting "(a) Copyright"; and

(2) by inserting at the end the following:

"(b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.".

SEC. 12. MISCELLANEOUS TECHNICAL AMENDMENTS.

(a) AMENDMENTS TO TITLE 17, UNITED STATES CODE. — Title 17, United States Code, is amended as follows:

Appendix D

17 USCA Ch. 1

(1) The table of chapters at the beginning of title 17, United States Code, is amended —

(A) in the item relating to chapter 6, by striking "Requirement" and inserting "Requirements";

(B) in the item relating to chapter 8, by striking "Royalty Tribunal" and inserting "Arbitration Royalty Panels";

(C) in the item relating to chapter 9, by striking "semiconductor chip products" and inserting "Semiconductor Chip Products"; and

(D) by inserting after the item relating to chapter 9 the following:

"10. Digital Audio Recording Devices and Media . . . . . 1001".

(2) The item relating to section 117 in the table of sections at the beginning of chapter 1 is amended to read as follows:

"117. Limitations on exclusive rights: Computer programs.".

17 USCA § 101

(3) Section 101 is amended in the definition of to perform or display a work "publicly" by striking "processs" and inserting "process".

Appendix D

17 USCA § 108

(4) Section 108(e) is amended by striking "pair" and inserting "fair".

17 USCA § 109

(5) Section 109(b)(2)(B) is amended by striking "Copyright" and inserting "Copyrights".

17 USCA § 110

(6) Section 110 is amended —

(A) in paragraph (8) by striking the period at the end and inserting a semicolon;

(B) in paragraph (9) by striking the period at the end and inserting "; and"; and

(C) in paragraph (10) by striking "4 above" and inserting "(4)".

17 USCA § 115

(7) Section 115(c)(3)(E) is amended —

(A) in clause (i) by striking "sections 106(1) and (3)" each place it appears and inserting "paragraphs (1) and (3) of section 106"; and

(B) in clause (ii)(II) by striking "sections 106(1) and 106(3)" and inserting "paragraphs (1) and (3) of section 106".

Appendix D

17 USCA § 119

(8) Section 119(c)(1) is amended by striking "until unless" and inserting "unless".

17 USCA § 304

(9) Section 304(c) is amended in the matter preceding paragraph (1) by striking "the subsection (a)(1)(C)" and inserting "subsection (a)(1)(C)".

17 USCA § 405

(10) Section 405(b) is amended by striking "condition or" and inserting "condition for".

17 USCA § 407

(11) Section 407(d)(2) is amended by striking "cost of" and inserting "cost to".

17 USCA Ch. 5

(12) The item relating to section 504 in the table of sections at the beginning of chapter 5 is amended by striking "Damage" and inserting "Damages".

17 USCA § 504

(13) Section 504(c)(2) is amended by striking "court it" and inserting "court in".

Appendix D

17 USCA § 509

(14) Section 509(b) is amended by striking "merchandise; and baggage" and inserting "merchandise, and baggage".

17 USCA § 601

(15) Section 601(a) is amended by striking "nondramatic" and inserting "nondramatic".

(16) Section 601(b)(1) is amended by striking "subsustantial" and inserting "substantial".

17 USCA Ch. 7

(17) The item relating to section 710 in the table of sections at the beginning of chapter 7 is amended by striking "Reproductions" and inserting "Reproduction".

17 USCA Ch. 8

(18) The item relating to section 801 in the table of sections at the beginning of chapter 8 is amended by striking "establishment" and inserting "Establishment".

17 USCA § 801

(19) Section 801(b) is amended —

(A) by striking "shall be —" and inserting "shall be as follows:";

(B) in paragraph (1) by striking "to make" and inserting "To make";

(C) in paragraph (2) —

(i) by striking "to make" and inserting "To make"; and

(ii) in subparagraph (D) by striking "adjustment; and" and inserting "adjustment."; and

(D) in paragraph (3) by striking "to distribute" and inserting "To distribute".

17 USCA § 803

(20) Section 803(b) is amended in the second sentence by striking "subsection subsection" and inserting "subsection".

17 USCA Ch. 9

(21) The item relating to section 903 in the table of sections at the beginning of chapter 9 is amended to read as follows:

"903. Ownership, transfer, licensure, and recordation.".

17 USCA § 909

(22) Section 909(b)(1) is amended —

(A) by striking "force" and inserting "work"; and

(B) by striking "sumbol" and inserting "symbol".

Appendix D

17 USCA § 910

(23) Section 910(a) is amended in the second sentence by striking "as used" and inserting "As used".

17 USCA § 1006

(24) Section 1006(b)(1) is amended by striking "Federation Television" and inserting "Federation of Television".

17 USCA § 1007

(25) Section 1007 is amended —

(A) in subsection (a)(1) by striking "the calendar year in which this chapter takes effect" and inserting "calendar year 1992"; and

(B) in subsection (b) by striking "the year in which this section takes effect" and inserting "1992".

(b) RELATED PROVISIONS. —

17 USCA § 914 NOTE

(1) Section 1(a)(1) of the Act entitled "An Act to amend chapter 9 of title 17, United States Code, regarding protection extended to semiconductor chip products of foreign entities", approved November 9, 1987 (17 U.S.C. 914 note), is amended by striking "orginating" and inserting "originating".

Appendix D

18 USCA § 2319

(2) Section 2319(b)(1) of title 18, United States Code, is amended by striking "last 10" and inserting "least 10".

17 USCA §§ 101, 104A, 108, 109, 110, 114, 115, 116, 119, 303, 304, 405, 407, 411, 504, 509, 601, 708, 801, 802, 803, 909, 910, 914, 1006, 1007 nt

18 USCA § 2319 nt

SEC. 13. EFFECTIVE DATES.

(a) IN GENERAL. — Except as provided in subsections (b) and (c), the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) SATELLITE HOME VIEWER ACT. — The amendments made by section 1 shall be effective as if enacted as part of the Satellite Home Viewer Act of 1994 (Public Law 103-369).

(c) TECHNICAL AMENDMENT. — The amendment made by section 12(b)(1) shall be effective as if enacted on November 9, 1987.

Approved November 13, 1997.